MALPRACTICE.

RESPONSIBILITIES OF SURGEONS AND PHYSICIANS.

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Fashion changes, and often in an unaccountable manner. A variation of tastes, desires, etc., causes a reversal from new to old, and *vice versa;* not least apparent is it as regards medical subjects. First among the masses, second with the judiciary, and third with the physicians themselves.

There was a time when, in cases of fractures, dislocations, and injuries of various kinds, that a perfect cure —the restoration of the part to the same condition as before the injury—was not expected, either by the physician or layman; fractures healing with slight deformations, dislocations not fully reduced, and injuries with some degree of contraction in the muscles of the part, were looked upon as the best efforts of surgery. Times changed; the periodical outburst of a change in medical ideas without an adequate increase of knowledge seized upon physicians, the masses were not slow to learn and to seek profit from the quarrels of science and commence at once an onslaught upon every unlucky individual who could be inveigled into assuming responsibilities of surgical cases, until from being a position of profit and honor, holding out prospects to the best scientific energies the professions commanded, it became dangerous in

the extreme to accept a case. Instead of money received for services of value given, it became money paid out, reputation injured, and the chances of progress stopped. We would call attention shortly to some points that have been observed by ourself, and also the teaching of authorities as regards the liabilities and rights of the profession in certain cases.

We remember very distinctly a case where the rules of conservative surgery were applied to their full extent —a comminuted compound fracture of both bones of the fore arm by railroad injury, the soft parts as well as the bones were mashed into a pulp for the space of eight or nine inches, embracing nearly the entire shaft of both bones. Amputation was thought of, but conservatism decided upon, the limb treated by being wrapped in wet sections of bandage and laid upon pillows. The treatment continued for several months, suppuration taking place. Finally several pieces of diseased bone were removed. When the proper time came it was supported by means of splints, and after fourteen or sixteen months, the parts partially consolidated, but a false joint remained. Two years afterwards, under every mode of treatment, the false joint became by ligementous union, immovable enough to permit the use of the arm in a good degree, although the limb was somewhat deformed and weak, and the fingers more or less contracted.

Now no suit was entered, but we see what a chance there was for a hue and cry to be raised by the patient and friends, and what a risk the surgeon encountered in his conservatism with the long time, deformity, and weakened arm.

Two questions might have, and at the present day no doubt would be raised. First—Ought not the arm to have been amputated? Second—Was not the final result in consequence of neglect or want of skill? Such is but a specimen of the risk of conservative surgery. This

kind of surgery may be the best for the patient, and the right thing as far as science is concerned, but is it not worse for the surgeon? and can he afford, with popular opposition as it is—the patient being desirous of taking any advantage of the surgeon—to assume such risks?

For the safety of the profession, which presupposes the interests of their patients, in the aggregate, ought not such limbs to be amputated?

Two cases are reported in our authorities. In one amputation was called for, and was performed. Subsequently a financial chance presented itself to the patient or his legal friend. Suit was instituted, the arm disinterred, malpractice alleged in that the arm ought to have been saved. An intelligent jury returned verdict for damages for several thousand. In the other cases treated by the same surgeon, conservative surgery was tried, deformity to a slight degree followed, suit commenced with plea, want of care and diligence. In escaping the whirlpool he ran upon the rock. Disaster was inevitable in either event. Although before eminent and experienced, alarmed and disgusted, he quit the profession where malice, jealousy and desire for gain can instigate, and a faulty popular opinion and a faulty law could accomplish his ruin.

We will mention a case where, although suit was not commenced, it might have been, and, perhaps, with success under some circumstances, and, indeed, was advised by a physician who yet was not able to cast the first stone in innocence. A fracture of the lower end of the radius, the lower fragment drawn in toward the ulna, the upper fragment overriding it. Everything was tried; extension and counter-extension, adduction of the hand, pressure, etc. Nothing availed. Some, no doubt, will imagine they could have succeeded. No one should judge unless he had actually been present. The surgeon who attended was at that time the most eminent in the State, and since none have appeared his superior. The

fracture healed with great deformity, and yet without fault upon the part of the surgeon. Still he might have been ruined, at least greatly annoyed. It is for the physician to have common sense views as well as scientific rules, to possess capacity to make allowance for the exceptions that will occur, as well as to follow the written, but rather imperfect word; the treatment of the fractures, as, indeed, the general practice in any department, is not gilt-edged, but full of difficulties unforeseen.

Prof. Hamilton has done more to make clear this truth, as applied to surgery at least, than any other man; his views, however, although more fully expressed, only accord with the old moderns, such as Samuel and Sir Ashley Cooper, and their contemporary, but coming, as they did, at a time when the profession, in a spirit of pride and egotism, had started the fashion that with proper treatment all fractures could be made perfect, and when the people were disposed to hold them to such erroneous doctrines, it acted as a charge of nitro-glycerine in a blast, did more execution at once than numerous picks through a length of time.

The case of Thompson vs. Reagan and Mitchell, now progressing in a neighboring county, where the injury to the limb, healed with some shortening and a divergence to one side, is a case suited to deceive the populace and to stimulate the energies of the lawyers. It has accomplished both, and we look for nothing but a verdict in favor of the plaintiff. [Since this writing a verdict has been returned for $4,500 damages.] And yet rightly considered, the deformity was without much, if any, fault upon the part of the defendant, the truth of the case being that the patient used the limb before the perfect ossification of the callous. Absorption due to pressure from use took place more upon one side than the other, gradual in progress, and in consequence healing with deformity. In many cases no one can tell just at what time it is safe for the patient to commence the

use of the part. We believe that the deformity in this case arose solely from the cause mentioned. Circumstances often modify abnormal manifestations, interfering with the action of remedies or the healing power of nature with the presumed result of our practice at every step. No man so skilled but he may be frustrated by some hidden obstacle. The same rules will not always hold good in cases that are judged alike. Similarity is not identity. Analogy should guide us rather than true experience that works by undeviating rules.

What then is the remedy? Some will say, "the unity of the profession as to the application of a general rule that deformity of some kind or degree is to be looked for, perfect cures being the exceptions," but this is no true remedy; it places the profession in a false position; it entails upon them a continual fight—a true fight for existence, where indeed if the Darwinian theory of the "survival of the fittest" held true as between the masses and the physician, the fitness would not refer to professional ability, but rather to tact—and who can doubt the end? But even if the unity of the profession could act as the remedy for malpractice suits, such a status is not possible. The principle might be recognized, but the profession possesses no power. Even with some cohesive power self-interest does not always bind them. It is without doubt to their credit that this is so, but their financial and other interests are liable to suffer in consequence.

The remedy is not in the law as it stands at present. It is true that the principles, the violation of which constitute malpractice, are just and reasonable.

The observance of ordinary skill and diligence is certainly not too much to demand of the physician. They cannot and do not ask for any changes in this respect. No law should lessen their obligaations. But admitting all this, we insist that the profession is outraged at the very threshhold of the temple, for a true principle of

this law is that the average skill is to be judged of according to the chances the physician possesses of becoming skillful. If he is legally debarred from such a chance can he justly be held legally responsible for his want of skill? Certainly not, and yet this is the condition. The sepulchre is a holy place, the body of those who without friends to mourn them are carefully guarded that the hand of science shall not infringe upon their rights, they are laid away like tender infants, guarded from the vandal "doctors," who cannot become skilled without they are amenable to law. If they obtain the means and become so skilled they are likewise criminals. Such a legal position, while it contains the essence of foolishness, is the extreme of wrong. No suit for malpractice should receive the moral support of those who love justice, until this anomalous condition is remedied. We care not how humble, how ignorant, or how criminal in his ignorance the physician, according to law, may be, for first: it is unjust to require more than is permitted to be learned, and, second, it is unmanly.

The law corrals the profession, throwing open wide the doors, and inviting all to enter. Tempted, they rush in with their eyes fixed upon the goal beyond, but a barrier is erected, and anon the doors are closed. They are required to advance, but cannot; to return they find no way. The trap has been a sure one, and they suffer for want of foresight.

The profession has duties to perform for itself as well as for the public, and in pursuit of such duties it will not be surprising that they exhaust all resources to remedy the great evil that we have mentioned. If we should suggest a remedy, it would be a law enacted by the present Legislature embracing the following points: First, a limitation should be established, so that no suit for malpractice after an expiration of two years from the commencement of the case by the physician could be instituted. The sword of Damocles should not always

threaten us. Second, there should be a limit to the amount that could be recovered, for certainly excessive damages are as repugnant as excessive bail, which is not allowed by the court. Third, a bond for the payment of cost of suit and damages both, in case the suit is not sustained, should be given by the plaintiff.

The first and second clauses are so just and in accordance with the general principles of law, that we leave them without comment.

The third clause may be objected to by some. But if we consider that every suit of this nature injures the practitioner both in purse and reputation, and that, indeed whether the suit is sustained or not, it becomes at once a matter of great importance. It may be true that where the plaintiff is responsible, a counter suit of damages for slander might reimburse the physician; so that he would not be kept without a remedy. Such was the result in the case of Professor Sayer, of New York, who instituted a suit for injury done his professional reputation, and was awarded the sum of $30,000. Now, if all who honestly or maliciously commenced action for malpractice were as responsible as his patient, then the profession would desire no more; but in reality, not one party in ten are worth what the law allows them. If they were, not one in ten of suits would be instituted. Unless a protection such as this mentioned, is furnished, the responsible members of the profession at least will be driven to refuse all cases whether medical or surgical, occurring in patients not responsible, and although the financially good are not *per se*, professionally so, still we hesitate not to say that the man, irresponsible financially and professionally considered, will have sole charge of the most difficult and dangerous cases. The patients will have to submit to this, for there fortunately is no law compelling the acceptance of a patient. It is not the best thing that could happen; it is not what either patient or physician would desire. But necessity will

compel the adoption of such a course. Even if we would, we cannot escape the conclusion. The evil has grown to an enormous proportion, especially in this State. The remedy is simple. A remedy that will protect both physician and patient. If some laws as the above were passed, it would be efficient. The profession ask no more, and those who might then be caught in fault would receive no sympathy from their fellows in case ordinary skill and dilligence were not possessed or exercised by them.